No. 85-701

In The Supreme Court
Of The United States

October Term 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS
FOR LIFE, INC.,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE, HOME BUILDERS ASSOCIATION OF MASSACHUSETTS, IN SUPPORT OF APPELLEE.

Marcia D. Seeler
Wayne S. Henderson*
New England Legal Foundation
55 Union Street
Boston, Massachusetts 02108
(617) 367-0174
Counsel for Amicus Curiae

* Counsel of Record
April 4, 1986

QUESTION PRESENTED

Whether 2 U.S.C. s.441b can be applied to prohibit corporate expenditures for the publication of political information and ideas on public issues -- without approval of or coordination with any candidate's campaign, and without endorsing any particular candidate -- and if so, whether such application violates the First Amendment freedoms of speech and association?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

No. 85-701

In The Supreme Court
Of The United States

October Term 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS
FOR LIFE, INC.,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE, HOME BUILDERS ASSOCIATION OF MASSACHUSETTS, IN SUPPORT OF APPELLEE.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Home Builders Association of Massachusetts (hereinafter the Association) is a non-profit tax exempt corporation organized under the laws of the Commonwealth of Massachusetts for the purpose of articulating the position of the home building industry on any matter which affects the ability of the industry to produce housing for all citizens of the Commonwealth. Among its many activities, the Association monitors federal, state, and local government issues which may have an impact on the home building industry and its ability to provide housing opportunities to the public.

In order to fulfill its objectives the Association periodically prepares, prints and distributes a newsletter. As well as notifying its members of other information integral to the building trade, the newsletter also includes summaries of proposed legislation at the state

level which could affect the home building business. These summaries include critiques of those legislators who support or oppose important bills.

The Association desires to expand its newsletter to include reference to federal as well as state activity. Such reference may well include publication of the voting records or positions of federal candidates. As a result, the Association is likely to confront issues identical to those presented in the instant suit.

The Home Builders Association of Massachusetts, therefore, has a vital interest in presenting to the Court its position on the issues involved, by the filing of its brief amicus curiae in support of the Appellee in this action.

STATEMENT OF THE CASE

The case is before the Court on an appeal by the Federal Election Commission (hereinafter FEC) from a judgment of the United States Court of Appeals for the First Circuit. The action was initiated in the District Court by the FEC which alleged that the Massachusetts Citizens For Life (hereinafter MCFL) a non-profit corporation, violated 2 U.S.C. s.441b(a) by using corporate funds to prepare, print and distribute a special election edition of its newsletter to members of the general public.

The special edition newsletter at issue was published prior to a primary election held on September 19, 1978. The cost of the publication and a subsequent redistribution of a re-edited version of the newsletter was $9,812.76. Both versions listed all candidates in the primary election for federal and state offices and reported their positions on three pro-life issues: a constitutional human life amendment, legislation

to prohibit the use of tax funds for abortions, and legislation to provide positive alternatives to abortion. While the publication did urge readers to vote "pro-life," it also stated that "(T)he Mass. Citizens For Life election survey is an educational service to help you cast an informed vote when you go to the polls on September 19th." Moreover, it included a specific disclaimer that, "(T)his special election edition does not represent an endorsement of any particular candidate."

Following cross-motions for summary judgment, the District Court issued an opinion on June 29, 1984 in which it dismissed the FEC's complaint. The District Court concluded that the MCFL did not violate s.441b(a) because the newsletter in dispute was exempted from the definition of expenditure as a periodical publication. In the alternative, the Court found that the application of s.441b(a) to the newsletter of the non-profit issue-oriented

corporation would violate its rights to freedom of speech, press and association under the First Amendment of the United States Constitution.

The Court of Appeals affirmed the District Court's ruling solely on the constitutional grounds. The Court found the statutory definition of "expenditure" to be ambiguous and turned to the legislative history of the Act. Based upon its interpretation of the legislative history the Court concluded that MCFL'S publication of the special edition newspaper was within the ambit of prohibited expenditures under s.441b(a).

The court found, however, that the statute provided a context-based restriction on speech, permissible under the First Amendment only when narrowly drawn to achieve a compelling governmental interest and that the FEC had failed to satisfy this requirement in prohibiting MCFL'S expenditures for publication of its Special Election Editions. Therefore, the Court concluded that the application of s.441b(a) to indirect,

uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates is a violation of that organization's First Amendment rights.

SUMMARY OF ARGUMENT

I. The Publication of The MCFL Newsletter is Not An Expenditure in Connection With a Federal Election Within the Meaning of 2 U.S.C. s.441b.

The Federal Election Campaign Act, at 2 U.S.C. s.441b which generally prohibits corporations from making a contribution or expenditure in connection with a federal election, must be read in context with s.441b(2), which limits the prohibition to those expenditures or contributions which are made to a candidate, campaign committee or political party. The statutory language provided in these sections is not ambiguous. Consequently, it is unnecessary to resort to an examination of the legislative history of the Federal Election Campaign Act in order to interpret the statute. Furthermore, incorporating the general definitional section of the Act into section 441b, as the FEC

advocates, improperly negates the specific statutory language contained in that section.

A violation of s.441b, is made out only if a corporation expends funds for the purpose of expressly advocating the election or defeat of a candidate. Since the MCFL Newsletter was published solely for educational purposes, and not to endorse specifically named candidates, the publication did not constitute an expenditure in violation of the Act.

II. The Prohibition Against Corporate Expenditures in Connection With a Federal Election is Unconstitutionally Vague.

As the Court of Appeals held, the restriction on corporate expenditures in the Federal Election Campaign Act constitutes a content-based restriction on free speech. The term "in connection with" a Federal Election, as it is interpreted and applied by the FEC, is unconstitutionally vague, as it does not adequately forewarn and describe the parameters of

prohibited conduct. Continued prosecutions by the FEC based solely upon this standardless term will chill constitutionally protected speech.

III. The MCFL Publication is Protected By The First Amendment Guarantees Of Free Speech and Association.

The First Amendment guarantees not only the right to speak but also the right to publish, circulate or distribute that speech. This right does not depend upon the individual or corporate identity of the speaker, because the right to associate, in corporate or any other form, in order to advance an ideological cause is similarly protected by the First Amendment. Any restriction placed upon this constitutionally guaranteed right must be narrowly drawn to serve a compelling governmental interest.

IV. The FEC Has Failed to Demonstrate a Compelling Government Interest Sufficient to Justify Prohibiting the MCFL Publication.

The FEC has failed to demonstrate a compelling governmental interest in prohibiting the MCFL publication. Under the standards set by this Court, the FEC may justify its broad interpretation of the Act's prohibitions only if such interpretation is required to prevent corruption, or the appearance of corruption, in the electoral process. MCFL's publication represented an expenditure independent from, and uncoordinated with, any candidate or political party. Such expenditure could not corrupt an election, since the opportunity for the corporation to exact a political debt from a candidate was nonexistent. Therefore, the broad restriction against the corporate expenditures at issue in this cae violates the constitutional protections of free speech and association.

ARGUMENT

I. THE PUBLICATION OF THE MCFL NEWSLETTER IS NOT AN EXPENDITURE IN CONNECTION WITH A FEDERAL ELECTION WITHIN THE MEANING OF 2 U.S.C. s.441b.

A. Section 441b Does Not Prohibit Corporate Contributions or Expenditures Not Made to Candidates, Campaign Committees, or Political Parties or Organizations.

Pursuant to 2 U.S.C. s.441b(a), it is unlawful for any corporation to make a "contribution or expenditure" in connection with any federal election. The operative phrase is defined as follows:

> (F)or the purpose of this section ... the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization in connection with any election to any of the offices referred to in this section ... 2 U.S.C. s.441b(b)(2) (emphasis added).

According to the very terms of the statute, therefore, a corporation is not prohibited from expending funds in connection with a federal election unless those funds are targeted to the election or defeat of a specific candidate, committee, party, or organization.

The Complaint against the Massachusetts Citizens for Life (MCFL) brought by the Federal Election Commission (FEC) in this action alleges that the non-profit corporation expended funds "in connection with" an election, not that it contributed to a candidate, or that the expenditures for the newsletters were made to, in concert with, or approved by a named candidate. Absent an allegation which charges this nexus between an expenditure of funds and a particular candidate, there can be no finding that MCFL violated the federal election law.

The Court of Appeals erroneously held, despite the wording of the statute, that the definition of contribution or expenditure appearing in

s.441b(b)(2) is not inclusive. While acknowledging that the starting point in every question of statutory construction is necessarily the statute itself, the Court found some ambiguity in the statute, and, consequently chose to examine the legislative history surrounding the Federal Election Act. Regardless of the specific statutory limitation on the term "contributions or expenditures" stated in s.441b(b)(2), the Court concluded that the prohibition against corporate expenditures must be expanded to include the broader definition of the word "expenditure" which is found in the general definitions section of the Act. This broader definition prohibits, "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" 2 U.S.C. s.431(9)(A) (1982). (emphasis added)

Not only does the lower Court's interpretation of the Act violate the acknowledged principle,

that statutory construction must, where possible, rely exclusively on the plain meaning of statute itself, but it also ignores the clear conditioning statement in s.431(9)(B)(v) that the term "expenditure" does not include -

> any payment or obligation incurred by a corportion or labor organization which, under s.441b(b) would not constitute an expenditure by such corporation or labor organization.

Thus, an interpretation such as that of the Court of Appeals, which would incorporate the general definitional sections of the Federal Election Campaign Act into Section 441b, both negates this specific statutory provision and effectively denies the language of s.441b(2). A blanket prohibition against corporate expenditures intended to influence any election for federal office, would subsume and render surplus the more precisely drawn prohibition against corporate expenditures in behalf of a candidate, campaign committee or political party.

The plain language of the statute should not be contorted so as to nullify the narrowly written restrictions enumerated in s.441b.

B. Section 441b Prohibits Only Expenditures or Contributions Which Expressly Advocate the Election or Defeat of a Particular Candidate.

The purpose of the MCFL newsletter was to provide informtion to voters on the public issue of interest to the organization, and to encourage votes to be cast in furtherance of the organization's philosophy on that issue. No particular candidate was either endorsed or attacked. The statute, therefore, simply does not apply to such an informational issue-oriented publication.

The MCFL newsletters were published to provide an educational service and not to expressly advocate the election or defeat of a particular candidate. The newsletter specifically states "(T)he Massachusetts Citizens for Life election survey is an educational service to help you cast

an informed vote when you go to the polls on September 19th." To reinforce the impartial nature of the publication the final page of the newsletter stated, "(T)his special election edition does not represent an endorsement of any particular candidate." Federal Election Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 15 (1985).

The identification of a candidate's views on a specified issue and an exhortation to vote according to a certain ideology do not violate the Federal Election Campaign Act. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court, in another context, set out an "express advocacy" requirement for an action to violate the statute. The Court asserted that the term "express advocacy" applies only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' 'reject,' etc." 424 U.S. at 44, n.52. The Court concluded,

> [W]e construe 'expenditure' ... to reach only funds for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending which is unambiguously related to the campaign of a particular candidate. (footnote omitted). 424 U.S. at 80.

As both the District Court and the Court of Appeals found, the exhortation in the newsletter "Vote Pro-Life" does not "fit within the Buckley definition of express advocacy because it does not advocate the election of particular candidates for particular offices, but urges support of a general position on a controversial issue." FEC v. MCFL, 769 F.2d at 20.

Despite its conclusion on this point, the Court of Appeals proceeded, impermissibly to expand the Buckley definition, in holding the newsletter's general issue-oriented advocacy to be prohibited express advocacy. The Court of Appeals found the inclusion of the pictures of certain pro-life candidates and the statement that "your

vote in the primary will make the critical difference in electing pro-life candidates," transformed the mission of the newsletter from one of providing public information on a general issue to one of advocating the election of specific, identified candidates. The Court's reading of the purpose and effect of the newsletter is, however, misplaced.

It is true, as the Court of Appeals has stated, that only candidates who supported pro-life positions had pictures published in the newsletter. Yet, in the race for the United States Senate, two pro-life candidates were featured, and in the Fifth Congressional District race none of the pro-life candidates was represented photographically. Similarly, in the First Congressional District, Silvio Conte's picture was published even though he was an unopposed incumbent. The purpose of the publication was to advocate a particular ideology by informing the electorate which, if any,

candidates supported that ideology and not to promote the election of a particular candidate. The choice between two pro-life candidates, or between two pro-choice candidates, was left to the voters without any influence from MCFL.

In fact, the inclusion of a candidate's pro-life position in this publication may well have been a detriment rather than a benefit in his re-election campaign. As this Court has stated, independent expenditures made purportedly in support of a candidate may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. Buckley v. Valeo, 424 U.S. at 47; Common Cause v. Schmitt, 522 F. Supp. 489 (D. D.C. 1980), aff'd, 455 U.S. 129 (1982). The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Buckley, supra. at 47.

This point is amply illustrated by the MCFL publication. It is unknown whether any of the candidates listed in the newsletter desired their pro-life/pro-choice record or position to be an issue in their election campaign. In fact, the publication of a candidate's voting record on this issue is equally informative to a voter predisposed against pro-life issues, as to one who supports MCFL's position. Although one recipient of the MCFL newsletter may favored Howard Phillips, Democratic candidate for United States Senate in the 1978 primary, because of his pro-life record, another voter might be equally persuaded by the newsletter to vote for his opponent, Paul Tsongas upon learning of his pro-choice position. Indeed, as the opinion of the District Court noted, to the extent that the newsletter was distributed beyond defendant's membership, "it probably lessened rather than enhanced the prospects of election of candidates subscribing to defendants' platform which,

according to public opinion polls, is opposed by most citizens." Federal Election Commission v. Massachusetts Citizens For Life, Inc. 589 F.Supp. 646, 649 (D. Mass. 1984).

The Federal Election Campaign Act was not intended to reach such impersonal (or multi-personal) advocacy, which serves only to inform the electorate on a public issue, leaving the choice among candidates still very clearly in the hands of the voters.

II. THE PROHIBITION AGAINST CORPORATE EXPENDITURES IN CONNECTION WITH A FEDERAL ELECTION IS UNCONSTITUTIONALLY VAGUE.

Pursuant to s.441b, a corporation is prohibited from making "expenditures or contributions" in "connection with a federal election." As has been discussed, there are significant questions concerning the definition of the word "expenditure" as it is used in the Federal Election Campaign Act. There is even greater uncertainty — which, particularly in the context of a content-based restriction on free-speech, presents an issue of constitutional proportions — over the meaning of the term "in connection with" any federal election as it is used in the prohibition against corporate expenditures. The amicus submits that the term, as interpreted and applied by the FEC, is unconstitutionally vague, as it cannot adequately

forewarn and describe the parameters of prohibited conduct. The term "in connection with" is not defined in the Act. Consequently, the FEC freely decides whether to prosecute an action based solely on its subjective view that a statement or publication may have a sufficient nexus with an election to have been "in connection with" that election. Civil penalties and/or criminal prosecution may be imposed, therefore, even though an association has no objective standards or criteria by which to determine the permissibility of its conduct under the statute. Other more precisely worded statutes have been invalidated as being unconstitutionally vague, and the FEC's reading must follow suit.

Nowhere are the constitutional implications of vagueness more dangerous than in the exercise of protected First Amendment rights. NAACP v. Button, 371 U.S. 415 (1963). "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit

the exercise of [those] freedoms,' ... Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden area were clearly marked." Buckley v. Valeo, 519 F. 2d 821, 874 (D.C. Cir. 1975) (en banc) (per curiam), aff'd in part rev'd in part, 424 U.S. 1 (1976) (per curiam) (citations omitted). Because of the potential chilling effect upon the exercise of vital First Amendment rights, the government may regulate expression and association only with narrow specificity and carefully drawn regulations which proscribe only unprotected, and not protected, expression. NAACP v. Button; Cantwell v. Connecticut, 310 U.S. 296 (1940).

Section 441b(a), which circumscribes corporate expenditures "in connection with" a federal election, does not meet these long established constitutional standards. Given the breadth of interpretation applied by the FEC, the statute fails to clearly mark the boundaries between

affected and unaffected conduct with narrow specificity. Would, for example, the FEC have deemed the MCFL newsletter to be an expenditure if the organization had published the newsletter on the same date but had dropped the admonition to vote pro-life? How prominent must an issue be in a given federal election for statements regarding that issue to be deemed "connected" with the election? May an interview of a candidate be published if there is no mention of an impending election? May an organization exhort the importance of voting only for candidates who hold a particular view if no identification is made of those candidates? Or is any reference to an election, or to the act of voting, necessarily made "in connection with" an election? Does a publication become connected with an election only by proximity of date, or only by content, or are both date and content required? Without answers to these and many other questions, no publicly spirited group can safely publish its views on either issues or individuals without facing

possible civil or criminal prosecution by the FEC.

The inhibiting impact of the FEC's preferred broad prohibition against corporate expenditures "in connection with" an election, if upheld, cannot be overestimated. MCFL is by no means unique in its position. Virtually every non-partisan, issue-oriented, non-profit corporation speaks or may wish to speak on matters of public importance. Any issue of such societal importance as to have spawned a supporting — or, for that matter, an opposing — organization is also likely to appear in one form or another as an electoral campaign issue. What more important topic for speech could there be for an issue-oriented group than the positions that candidates may have on those very issues which are the core of the organization's philosophy and purpose?

This point was acknowledged by the Court of Appeals in Buckley v. Valeo, in striking down Section 437(a) of the Federal Election Campaign

Act. In that case, the Court of Appeals held one provision, s.437(a), unconstitutionally vague and overbroad on the ground that the provision is "susceptible to a reading necessitating reporting by groups whose only connection with elective process arises from completely non-partisan public discussion of issues of public importance." No appeal was taken from that holding. Buckley, 519 F. 2d at 10, n. 7.

While the corporate structure of the various plaintiff organizations is not discussed in the Buckley case, the First Amendment implications of restricting discussion of candidates' qualifications, voting records and positions on campaign issues is thoroughly analyzed. In discussing the impact of s.437(a) on a specific plaintiff, the New York Civil Liberties Union, the Court noted that the organization publicizes in newsletters and other publications the civil liberties voting records, positions, and actions of elected officials, some of whom are candidates

for public office. In addition to the Civil Liberties Union, the Appeals Court also identified trade and professional journals, campus newspapers, union newsletters and even church bulletins as being potentially restricted by the Act. "Indeed, 'every Little Audubon Society Chapter' [might] be [interrupted], for 'environment' is an issue in one campaign or another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizens' rights' [might] fall under the Act." Id. at 871.

The Court of Appeals in Buckley also reviewed the dilemma faced by organizations attempting to comply with the statute.

> Discussions of [public issues which are also campaign issues], and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence in voting at elections. In this milieu, where do 'purpose' and 'design' 'to influence' draw the line? Do they connote

> subjectively a state of mind, or objectively only a propensity of influence? Do they require, inspection of state of mind, a capability of influencing, and if so how substantial a capability? What do they demand with respect to materials which 'advocat[e] the election or defeat of [a] candidate' or which 'set forth the candidate's position on [a] public issue' or 'his voting record,' beyond the inherent tendency of these materials to influence? Id. at 875.

The chill on constitutionally protected speech by similarly vague language is illustrated by a review of other FEC enforcement actions under the Act. Examples include actions filed by the FEC against a citizens' group for limited taxation for publishing voting records on tax issues, FEC v. Central Long Island Tax Reform Immediately Committee, 616 F. 2d 45 (2d Cir. 1980); prosecution of a committee which had paid for an advertisement appealing for the impeachment of the President and listing Congressmen who were recorded in favor of impeachment, United States v. National Impeachment Committee, 469 F. 2d 1135 (2d Cir. 1972); and an action against a union for

publishing and circulating a poster depicting former President Ford wearing a button reading "Pardon me" and embracing former President Nixon, FEC v. AFSCME, 371 F. Supp. 315 (D. D.C. 1979).

In each of the aforementioned cases, the Court determined that the FEC's reading of the statute was overly broad, and that the actions or publications of the organization at issue were permissible under the Federal Election Campaign Act.

How many more prosecutions by the FEC of non-profit, nonpartisan, issue-oriented organizations will be instituted before such groups, often ill-equipped to absorb the expense of defending their speech, will simply be forced to cease publishing their views? Is it not incongruous with the preferred position given to First Amendment rights, that individuals seeking to exercise these rights must justify their conduct and bear the costs of such justification before the FEC or in court when both the law and

its administering agency have failed to provide cognizable and well-defined standards? The chilling effect of this vague statute raises a spectre of all the evils which the First Amendment was designed to prevent. As Judge Kaufman stated, in a stinging rebuke to the FEC,

> [I]f speakers are not granted wide latitude to disseminate information without government interference, they will "steer far wide of the unlawful zone," Speiser v. Randall, 357 U.S. 513, 526 (1958), thereby depriving citizens of valuable opinions and information. This danger is especially acute when an official agency of the government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized. Accordingly, it is not completely surprising that the FEC should view the content of defendants' leaflet in a substantially different light than the members of this court ... Buckley v. Valeo, supra, imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our decision today should stand as an admonition to the

> Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility. FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d at 54. (Kaufman, C.J., concurring).

In the instant case the FEC has again failed to exercise its powers in a manner harmonious with a system of free expression.

III. THE MCFL PUBLICATION IS PROTECTED BY THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSOCIATION.

The First Amendment protects political expression in order to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). As this Court has noted, "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Buckley 424 U.S. at 14. If

speakers are not granted wide latitude to disseminate information, citizens will be deprived of valuable information and opinions. FEC v. Central Long Island Tax Reform Immediately Committee, 616 F. 2d at 55 (concurring opinion). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. Buckley, 424 U.S. at 15.

Because the First Amendment guarantees not only the right to hear, but also the right to receive information, the Amendment has been held to protect not only the right to speak but also the right to publish, circulate or distribute that speech. Thus, "[T]he right of freedom of speech and press includes, not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought and freedom to teach

..." Griswald v. Connecticut, 381 U.S. 479, 482 (1965). (emphasis added). Furthermore, "[L]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulating the publication would be of little value." Lovell v. Griffith, 303 U.S. 444, 452 (1937).

The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. First National Bank, 435 U.S. 765, 777 (1971). As the Court asserted in invalidating a Massachusetts statute prohibiting corporate speech on referendum issues:

> In the realm of protected speech, the Legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972). If a Legislature may direct business corporations to "stick to business," it also may limit other corporations — religious, charitable

> or civic — to their respective "business" when addressing the public. Id. at 785.

Freedom to associate for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Constitution. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 375 U.S. 449 (1966). "The right of 'association,' like the right of belief ... is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means." Griswald, 381 U.S. at 483. This right is most fundamentally applied to associations formed for the purpose of political expression. "[O]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). In fact,

"[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association..." Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California, 454 U.S. 290, 295 (1981). Its value lies in the fact that by collective effort individuals can make their views known, when individually their voices would be faint or lost. Id. at 294.

Given that the right of association to espouse social or political views is a fundamental right, under the First Amendment the question remains whether that right is diminished or even disappears when the group chooses to associate as a non-profit corporation. Contrary to the FEC's argument, Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982), is not dispositive on the application of the Federal Election Act on non-profit contributions, since that case focused on solicitations for contributions, and not on independent expenditures. In fact, the Court specifically

noted that "NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propogate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." FEC v. National Conservative Political Action Committee, 105 S.Ct. 1459, 1468 (1985).

MCFL, if unincorporated, could have spoken on candidates' voting records and pro-life positions, and could actively have advocated the election of individual candidates. California Medical Ass'n. v. FEC, 435 U.S. 182, 195 (1981). That right does not evaporate simply because MCFL chose to incorporate. Even the dissenting Justices in First National Bank acknowledged the specific problem of restricting the speech of non-profit corporations. "Undoubtedly, as this Court has recognized ... there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members or, as in the case of the press, of disseminating information and ideas. Under such circumstance,

association in corporate form may be viewed merely as a means of self-expression." 435 U.S. at 805. This principal has recently been reiterated in National Conservative Political Action Committee in which this court stated,

> NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify their voices ... To say that their collective action in pooling their resources to amplify their voices is not entitled full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthly to buy expensive media ads with their own resources. 105 S.Ct. at 1467-68.

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. Common Cause, 512 F. Supp. at 497. Virtually every means of communicating ideas in today's mass society

requires the expenditure of money. The distribution of the most humble handbill or leaflet entails printing, paper and circulation costs. Buckley, 424 U.S. at 19. To limit, or, in this case, prohibit the association from making expenditures to publish a newsletter or pamphlet precludes the association from effectively amplifying the voice of its adherents, the original basis for the recognition of a First Amendment protection of association. Id. at 22. "[A]llowing the presentation of views [while limiting expenditures] is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." National Conservative Political Action Committee, 105 S.Ct. at 1467. To restrain the ability of an independent association to expend resources on political expression is simultaneously to interfere with the freedom of its adherents. Buckley, 424 U.S. at 22.

IV. THE PUBLICATION OF THE MCFL NEWSLETTER MAY NOT BE PROHIBITED ABSENT A COMPELLING GOVERNMENTAL INTEREST.

A. The FEC Has Failed to Demonstrate a Compelling Government Interest in Prohibiting This MCLF's Publication.

As the Court of Appeals determined, "s.441b must be considered a content-based restriction on expression and may be justified only by a showing of substantial government interest." FEC v. MCLF, 769 F.2d at 22. Not only must the government demonstrate that a compelling interest exists, but it must also prove that the statute is closely drawn to avoid unnecessary abridgement of First Amendment rights. First National Bank, 435 U.S. 765.

In the area of political speech the government has sought to limit or restrict expression through the imposition of ceilings on expenditures and contributions to candidates and political parties. In support of these limitations, the government has traditionally advanced the following

justifications: (a) to prevent corruption or the appearance of corruption; (b) to reduce the political impact or influence of wealthy individuals or groups; and (c) to limit the costs of election campaigns. Of these three stated governmental interests, this Court has concluded that only the first is constitutionally sufficient to warrant restrictions on political expression. Buckley, 424 U.S. at 26.

While accepting the government's professed intent to protect the electoral process from corrupt influence, as justification for some measure of restriction, the Court has also found that only a limitation on contributions, and not a limitation on expenditures, furthers this aim appropriately and narrowly enough to survive constitutional challenge. The rationale for this distinction is that "[T]he absence of pre-arrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the

candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments." Id. at 47.

MCFL'S expenditure here was not coordinated with any campaign or candidate. The opportunity to exact a quid pro quo was non-existent. Indeed, the exposure of a candidate's views on right to life issues could be either a benefit or a burden in attracting a voter's support. The clear beneficiary of the information included in the newsletter was, therefore, not the candidates for election, but the voting public who received important information not available elesewhere. While the prevention of corruption has been identified as the compelling governmental interest behind the Federal Election Campaign Act, this Court has also sought to protect individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. National

Right to Work Committee, 459 U.S. at 207-208. This is not a legitimate concern in this case. As the Court of Appeals noted, "contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on the abortion issue. This would appear to be the very purpose of the organization and the contributions to it." FEC v. MCFL, 769 F.2d at 23.

Moreover, even the stockholders of a for-profit corporation retain other remedies against an expenditure if corporate funds for political purposes with which they disagree. They may, of course, sell their stock, band together to vote the responsible officers out of office, or in the extreme case, bring suit for the mis-application of corporate funds. The Federal

Election Campaign Act is neither necessary, nor was it intended, to provide additional protections to the stockholders, and particularly not at the expense of the important First Amendment rights at stake in this case.

B. The Prohibition Against Corporate Expenditures is Unnecesarily and Impermissibly Broad.

Even if a compelling interest could be found to justify restrictions on corporate speech, the prohibition contained in the Federal Election Campaign Act, as interpreted by the FEC in the instant case, is not sufficiently narrow to satisfy constitutional standards. Rather than prohibiting only those types of corporate contributions which could lead to corruption, or even the appearance of corruption, the FEC attempts to interpret the statute to blindly prohibit any and all corporate expenditures having even the slenderest of connections with an election.

As this Court has acknowledged, "the 'differing structures and purposes of different entities' may require different forms of regulation in order to protect the integrity of the electoral process" National Right to Work Committee 459 U.S. at 210, quoting California Medical Associates v. FEC, 453 U.S. 182, 201 (1981). "A corporation's expenditures to propogate its views on issues of general public interest are of a different constitutional statute than corporate contributions to candidates." National Conservative Political Action Committee, 105 S.Ct. at 1468. Yet, where the law requires that the restriction of First Amendment rights be carved out with a scalpel, the FEC has used a hatchet.

A narrow prohibition may be easily drawn to protect the government's valid interest, yet allow constitutionally protected speech: prohibit corporate contributions in elections, but permit independent expenditures by such entities provided

that there is full disclosure that the expenditure is made by a corporation. Prohibiting corporate contributions to candidates would prevent the possible purchase of candidates, the concern identified by the Court as the only valid compelling governmental interest in restricting political speech. Allowing such independent expenditures but requiring disclosure would permit constitutionally protected speech, while serving to notify the public that it is hearing corporate rather than individual speech. Permitting speech only with full disclosure would conform to guidelines set by the Supreme Court:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. First National Bank, 435 U.S. at 791.

CONCLUSION

The Home Builders Association of Massachusetts submits that Massachusetts Citizens For Life's publication of the special election edition newsletter did not constitute an expenditure in connection with a federal election in violation of 2 U.S.C. s.441b. Amicus further submits that the application of this statute to that publication is a violation of the First Amendment to the United States Constitution.

THE HOME BUILDERS
ASSOCIATION OF
MASSACHUSETTS

By its Attorneys,

Marcia Drake Seeler
New England Legal Foundation
55 Union Street
Boston, Massachusetts 02108
(617) 367-0174

Wayne S. Henderson
David A. Cohen (on brief)
New England Legal Foundation

DATED: April 4, 1986